STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2013
v	No. 308868 Wayne Circuit Court
MENDO ROMAN LOVE, Defendant-Appellant.	LC No. 11-008924-FJ

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant, Mendo Roman Love, of felony murder, MCL 750.316(b); armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, who was 16 years old when he committed these crimes, to a mandatory sentence of life imprisonment without the possibility of parole for the felony-murder conviction, 12 to 30 years' imprisonment for the armed-robbery conviction, and to 2 years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We vacate defendant's sentence for felony murder, remand for resentencing on that offense, and affirm defendant's convictions in all other respects.

I. BASIC FACTS

This case arises from the murder of Jarrett Kilgore in Detroit on December 8, 2009. On the day in question, defendant, D'Anthony Underwood (defendant's brother), Dethomas Winters, and an individual referred to as "Cash" (a.k.a. Chris) met at the Northland Mall in Southfield. At the mall, defendant indicated to the others that he was planning to rob the victim. Winters's girlfriend, Triaunne Lancaster, then drove the group from the mall to the area of Six Mile and Ilene Street to meet the victim. While in route, defendant spoke to the victim on Underwood's cellular telephone to arrange a marijuana purchase. When they arrived at the location, defendant and Winters exited the vehicle and went to meet the victim who was parked in a blue 1998 Ford Crown Victoria on "the next block." Winters and defendant's plan was to go to the victim's car, ask to see the victim's marijuana, snatch it, and "take off." But, when they got to the victim's car, the victim wanted Winters and defendant to get in. As a result, Winters sat in the back seat behind the victim, and defendant sat in the front seat. The encounter turned fatal when defendant pulled a handgun, wrestled for the handgun with the victim, and ultimately shot the victim. Defendant and Winters returned to Lancaster's car with the victim's marijuana and cellular

telephone. Lancaster then drove the group first to a Metro PCS store where defendant and Winters sold the victim's telephone and next to Winters's home where defendant and Winters split the marijuana. After developing a lead on Underwood through the victim's telephone records, the police interviewed both Underwood and Winters, who ultimately confessed their involvement in the victim's murder and implicated defendant. After having initial difficulty contacting defendant, the police eventually located and arrested him.

II. MANDATORY LIFE SENTENCE WITHOUT PAROLE

Defendant first argues that he is entitled to resentencing because his mandatory life sentence without the possibility of parole violates the Eighth Amendment of the United States Constitution's prohibition of cruel and unusual punishment. We agree.

Defendant failed to preserve this issue for appellate review because he did not object to his sentence on this basis in the trial court. See *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003). Therefore, we review this issue for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid issue forfeiture under the plain-error rule, defendant must prove the following: (1) there was an error, (2) the error was plain, and (3) the plain error affected substantial rights, i.e., the outcome of the lower-court proceedings. *Id.* at 763. Once defendant has established these requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings or resulted in the conviction of an actually innocent person. *Id.*

The Eighth Amendment to the United States Constitution states the following: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v Alabama*, ___US___; 132 S Ct 2455, 2463; 183 L Ed 2d 407 (2012) (quotation marks and citation omitted). That right "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id.* (quotation marks and citation omitted).

In *Miller v Alabama*, 132 S Ct at 2460, the United States Supreme Court held that a sentence of "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" The Court further held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469. The Court explained that "children are constitutionally different from adults for purposes of sentencing" and emphasized that a mandatory sentence of life without the possibility of parole for juvenile homicide offenders precludes consideration of the offender's age and "the wealth of characteristics and circumstances attendant to it."[1] *Id.* at 2464, 2467. Significantly, however, the

[1] Specifically, the Court emphasized that such mandatory sentences preclude consideration of the offender's "chronological age and its hallmark features" (such as immaturity, impetuosity, and

Court explained that its decision was not a categorical bar of life-without-the-possibility-of-parole sentences for juveniles; rather, "it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

Recently in *People v Eliason*, ___Mich App___; ___NW2d___, issued April 4, 2013 (Docket No. 302353), slip op at 1, 9, this Court applied the rule announced in *Miller* to hold that a mandatory sentence of life without the possibility of parole for a juvenile defendant convicted of first-degree murder was cruel and unusual punishment under the Eighth Amendment. The Court thus vacated the juvenile defendant's sentence for first-degree murder and remanded for resentencing. *Id.* at 9-10. The Court stated that the defendant was "not entitled to a remand at which the trial court has unfettered discretion to impose a sentence for any term of years." *Id.* at 9. Rather, the Court held that "the only discretion afforded to the trial court in light of our first-degree murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole or life imprisonment with the possibility of parole." *Id.* "[A] trial court can still sentence a juvenile for a homicide to life in prison without the possibility of parole, so long as that sentence is an individualized one that takes into consideration the factors outlined in *Miller*." *Id.* (citation omitted). The Court explained that "the *Miller* Court did not 'foreclose a sentencer's ability' to sentence a juvenile in a homicide case to life imprisonment without parole, so long as the sentence 'take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"[2] *Id.*, quoting *Miller*, 132 S Ct at 2469. Finally, the Court provided the trial court the following guidance for its proceedings on remand:

> In deciding whether to impose a life sentence with or without the possibility of parole, the trial court is to be guided by the following non-exclusive list of factors:
>
> > (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer

failure to appreciate risks and consequences), the offender's family and home environment, the circumstances of the homicide (including the extent of participation and the effects of familial and peer pressure), the possibility that the offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and the possibility of rehabilitation. *Miller*, 132 S Ct at 2468.

[2] The *Miller* Court specifically noted that "appropriate occasions for sentencing juveniles to this harshest possible penalty [of life without parole] will be uncommon. That is especially so because of the great difficulty…of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate but transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 132 S Ct at 2469 (quotation marks and citations omitted).

> pressure may have affected [the juvenile], (f) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth and (g) the potential for rehabilitation. [*Id.* (internal citation omitted).]

In the present case before this Court on direct review, defendant was 16 years old at the time of the felony murder. Thus, defendant was a juvenile for purposes of sentencing. See *Miller*, 132 S Ct at 2460. The trial court sentenced him to a mandatory sentence of life imprisonment without the possibility of parole. The court did not first consider defendant's youth and attendant characteristics. Thus, the trial court's failure to sentence defendant in accordance with *Miller* constituted plain error. See *id.* at 2467; *Carines*, 460 Mich at 763; *Eliason*, slip op at 9. The plain error affected defendant's substantial rights because defendant's mandatory sentence prohibited the trial court from considering defendant's youth and attendant circumstances and, thus, constituted cruel and unusual punishment. See *Carines*, 460 Mich at 763; *Miller*, 132 S Ct at 2460; *Eliason*, slip op at 9. Moreover, we choose to exercise our discretion to afford defendant relief because defendant's sentence in this case seriously affected the fairness and integrity of the lower-court proceedings. See *Carines*, 460 Mich at 763. Defendant, therefore, is entitled to resentencing in accordance with *Miller* and *Eliason*.[3] See *Eliason*, slip op at 10 (remanding for resentencing within the strictures of *Miller*).

Accordingly, we vacate defendant's mandatory sentence of life without the possibility of parole and remand for sentencing consistent with the directives of *Miller* and *Eliason*.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was deprived of the effective assistance of counsel for three reasons: (1) counsel failed to obtain discovery until just before trial and, thus, was not adequately prepared to represent defendant; (2) counsel failed to review and admit at trial Winters's recorded, crucial, and potentially exculpatory statement to the police; and (3) counsel failed to

[3] In its brief on appeal, submitted prior to this Court's issuance of *Eliason*, plaintiff contended that a remand for resentencing is improper and that defendant's remedy is to request that the parole board consider him for parole when he is eligible.[3] We reject this argument because it is inconsistent with both *Miller* and *Eliason*. *Miller* expressly requires that the *sentencer* of a juvenile convicted of homicide "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 132 S Ct at 2469. Simply affirming defendant's life sentence in this case would not give the *sentencer* the opportunity to consider defendant's youth and attendant characteristics; the parole board is not defendant's sentencer. Furthermore, plaintiff's proposed remedy fails to account for the fact that, after considering the juvenile offender's youth and attendant characteristics, the sentencer may impose a sentence of life imprisonment either with or without the possibility of parole. See *id.* at 2469, 2471; *Eliason*, slip op at 9.

present cellular-telephone records or any other evidence supporting defendant's position that he did not sell the victim's cellular telephone. We disagree.

Whether defendant was denied the effective assistance of counsel is a question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review this unpreserved issue for mistakes apparent in the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In a claim of ineffective assistance of counsel, "[t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *People v Toma*, 462 Mich 281, 316; 613 NW2d 694 (2000). To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance was so deficient that it "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under the *Strickland* test, defendant "bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

Defendant first argues that counsel was not adequately prepared for trial because he did not obtain discovery until shortly before trial. The record illustrates that, although defendant initially had counsel appointed to him, he later retained different counsel. Defendant's retained counsel entered his appearance on December 7, 2011. As of a hearing on January 4, 2012, defendant's retained counsel had not obtained discovery from the prosecution. At the end of the hearing, defendant was afforded the opportunity to view the preliminary-examination transcript. The first day of trial was January 23, 2012.

In *United States v Cronic*, 466 US 648, 659-660; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court recognized situations where the circumstances of a case implicating a defendant's right to the effective assistance of counsel are so likely to prejudice a defendant that "a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." The Court explained that there may be cases when "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-660. The Court opined that *Powell v Alabama*, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932), was such a case, discussing the case as follows:

> The defendants had been indicted for a highly publicized capital offense. Six days before trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. "Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but stated that he had not had an opportunity to prepare the case or to familiarize himself with local procedure, and therefore was unwilling to represent the defendants on such short notice. The problem was resolved when

> the court decided that the Tennessee lawyer would represent the defendants, with whatever help the local bar could provide.
>
> "The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them."
>
> This Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." The Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. Powell was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial. [*Cronic*, 466 US at 660-661 (internal citations omitted).]

After discussing *Powell*, the Court was quick to emphasize that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id.* at 662. The Court noted *Avery v Alabama*, 308 US 444; 60 S Ct 321; 84 L Ed 377 (1940), where

> counsel was appointed in a capital case only three days before trial, and the trial court denied counsel's request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time. [*Cronic*, 466 US at 661 (internal citations omitted).]

Accordingly, *Cronic* illustrates that a limited amount of time to prepare for trial is not always sufficient to establish ineffective assistance of counsel without inquiry into counsel's actual performance at trial. See *id.* at 661-662.

The present case is not a case where defendant obtained counsel on the first day of trial or even a few days before trial such that counsel had virtually no time to prepare. Although defendant generally argues on appeal that counsel obtained discovery "just prior to trial," there is nothing in the record demonstrating the temporal proximity between counsel's eventual obtainment of discovery and the start of trial to establish that "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." *Id.* at 660-661. The record does not disclose surrounding circumstances that justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial. See *id.* at 662.

Review of the record illustrates that the defense theory at trial was that defendant did not plan to rob the victim but, rather, simply planned to purchase marijuana from him and was present in the victim's car to facilitate the sale between Winters and the victim. Defense counsel cross-examined Underwood and Winters and attempted to impeach them through extensive questioning regarding the events surrounding the victim's death, the manner in which they changed their stories to the police, and the details of their plea agreements to demonstrate bias. Counsel also elicited testimony from defendant to present the defense's theory and vigorously advocated the theory during closing argument. Counsel is not ineffective for pursuing a strategy that ultimately failed. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant does challenge counsel's actual performance at trial in two respects, but neither is sufficient to prevail on a claim of ineffective assistance of counsel. Defendant first argues that counsel failed to review and admit at trial Winters's recorded and "potentially" exculpatory statement to the police. However, defendant has not established the factual predicate for this claim. See *Carbin*, 463 Mich at 600. At trial, Winters testified that he gave a statement to the police that was recorded without his knowledge. There is no record evidence demonstrating that counsel failed to review Winters's recorded statement. Moreover, there is no record evidence demonstrating that the recorded statement was exculpatory or beneficial to defendant. Furthermore, even assuming that counsel was deficient with respect to Winters's statement, defendant cannot demonstrate prejudice. See *Strickland*, 466 US at 694. Winters testified at trial that he initially did not implicate defendant in the victim's death but that he later truthfully told the police about defendant's involvement; a recording of an exculpatory statement that Winters made to the police before implicating defendant would be consistent this testimony. In addition, the prosecution offered significant evidence demonstrating defendant's guilt, particularly the testimony of Underwood and Winters. Moreover, there was evidence that could allow the jury to conclude that defendant was untruthful during both the investigation of the victim's murder and while testifying at trial. Specifically, Officer Eric Raby testified that when he asked defendant what his name was at the time he was executing the arrest warrant, defendant stated that it was Andre Mathis. Additionally, defendant's testimony that he used Underwood's telephone at the mall in Southfield to call the victim, but did not do so on the way to meet the victim in Detroit, was inconsistent with the telephone records admitted at trial.

Defendant also argues that counsel failed to present cellular-telephone records or any other evidence supporting his position that he did not sell the victim's cellular telephone. But again, defendant has not established the factual predicate for his claim. See *Carbin*, 463 Mich at 600. Defendant does not identify any evidence that counsel either failed to discover or admit at trial that demonstrates that defendant did not sell the victim's cellular telephone. Defendant alternatively argues that had counsel performed discovery and obtained information demonstrating that he did in fact sell the victim's telephone, counsel then could have "negotiated a possible plea agreement with the prosecution." However, this argument is entirely speculative; defendant cannot establish a successful plea negotiation in such circumstances.

Accordingly, defendant has failed to establish his claim of ineffective assistance of counsel.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan